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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-528

CONSUMERS POWER COMPANY, PETITIONER

v.

NELSON AESCHLIMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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1. Respondent Natural Resources Defense Council (NRDC) in No. 76-419 contends (Br. 10, 27, 47) that the Commission's choice of procedures in its rulemaking leading to promulgation of Table S-3 was an unjustified departure from settled agency practice. But by far the majority of Commission rulemakings, including those involving generic environmental and safety issues, have

been conducted simply by notice-and-comment procedures. Only two of the Commission's many rulemakings involved hearings at which questioning by participants and limited discovery were allowed.[1]

More than 20 significant Commission rulemaking determinations relating to the Commission's power plant licensing and environmental protection regulations (10 C.F.R. Parts 50 and 51) have been made on the basis of notice and comment procedures since 1970. Several of these informal rulemakings involved matters of substantial safety and environmental importance, including "Quality Assurance Criteria for Nuclear Power Plants," 35 Fed. Reg. 10498, "General Design Criteria for Nuclear Power Plants," 36 Fed. Reg. 3255, "Pre-Construction Permit Activities," 39 Fed. Reg. 14506, and "Environmental Protection—Licensing and Regulatory Policy and Procedures," 39 Fed. Reg. 26279. Informal rulemaking is the method that the Commission has typically chosen for treating generic environmental and safety questions. Thus, the degree of public participation provided by the uranium fuel cycle hearing is noteworthy as an enlargement, rather than a construction, of the procedural rights routinely afforded in Commission rulemaking.[2]

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[1]These two rulemakings are cited by NRDC as typical (Br. 49, n. 69). NRDC cites as a further example the proceedings on the "Generic Environmental Statement on Mixed Oxide Fuel" ("GESMO"), currently in abeyance (*ibid.*). But the GESMO procedures were not established until January 6, 1976 (41 Fed. Reg. 1133) and cannot be held up as an example of "settled agency practice" at the time of the 1973 fuel cycle hearing. In any event, the Commission has explicitly noted that the particular issues in the GESMO proceeding justified a departure from the usual procedures (41 Fed. Reg. 50834).

[2]The Brief for the Non-Federal Respondents in No. 76-528 (p. 25) and the Brief *Amicus Curiae* for 24 Named States (pp. 8-9, n. 13) suggest that changes in administration policy on plutonium fuel

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2. The Brief for the Non-Federal Respondents in No. 76-528 ("Aeschliman Brief") asserts (pp. 7-9, 34-35) that the Commission had agreed, long before it made the decisions reviewed by the court of appeals below, that energy conservation was an alternative to the construction of nuclear power plants that had to be considered in environmental impact statements. This is not the case.

While the Commission was aware in 1971 and 1972 that traditional ideas about meeting energy demands were being questioned in various forums, there is no indication that those questions had yet suggested arguably practical alternatives to nuclear power plants. The quotations purporting to show the contrary are inaccurate or are taken out of context.

For example, the Aeschliman Brief implies (p. 8) that the Commission, the Council on Environmental Quality and the Environmental Protection Agency agreed at Senate hearings in 1972 that the NEPA required consideration of the use of energy conservation to reduce the projected power needs, citing Joint Hearings on the Operation of the National Environmental Policy Act of 1969 before the Senate Committees on Public Works and Internal and Insular Affairs, 92d Cong., 2d Sess. 405-409 (1972) (hereafter "Joint Hearings").

But these hearings contain no mention of energy conservation. Indeed, the statement of EPA Administrator William D. Ruckelshaus suggests that agencies such as the

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recycling require reconsideration of Table S-3. But the revised environmental survey previously lodged with this Court has already evaluated uranium fuel cycle impacts in the absence of plutonium recycling. "In the survey the light water power reactor uranium fuel cycle was taken as including alternatively (1) no reprocessing of spent fuel and follow-on interim and or long-term storage or disposal of spent fuel or (2) reprocessing spent fuel for purposes other than recycle of plutonium * * *" (42 Fed. Reg. 34393).

Commission were *not* required by the NEPA to consider alternatives, such as energy conservation, that they did not have the authority to implement, and that were not within their area of expertise.[3] Instead, CEQ, EPA and the Commission simply stated, in effect, that the NEPA requires consideration in an environmental impact statement of "no action" as one alternative to a proposed agency action, and that the range of alternatives to be investigated is not bounded by the agency's jurisdiction.

Similarly, the Aeschliman Brief states (pp. 7-8), that

> In March, 1972 * * * the Commission told Congress that AEC Licensing Boards had the "authority and responsibility" to consider every aspect of a NEPA cost-benefit analysis, including "the rationing or limiting the use of electricity as an alternative to building a particular nuclear power plant * * *."

This summary distorts the record. The quoted language is taken in part from a question posed by Senator Jackson in a letter to the Commission; the entire exchange is

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[3]Mr. Ruckelshaus stated (Joint Hearings, *supra*, at 405):

> I believe that an agency may consider alternatives that are outside of its own authority to implement. * * * The question of whether an agency must consider and discuss such alternatives is much more difficult. The basic problem here is that federal agencies are by definition fully knowledgeable only in the areas within their statutory mandates, and for the [sic] reason they cannot be expected to be able to perceive and discuss alternative courses of action that might be either within the power of another federal agency or available only from hypothetical legislation in another field. There is no question that in enacting NEPA Congress intended that every federal agency acquaint itself with, and take account of, the environmental effects of its activities, but I do not think that in so doing Congress also required each agency to become familiar enough with the substantive aspects of other existing or possible programs to be able to comment on steps that might be taken in that regard.

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quoted below.[4] It shows that the Commission replied to the Senator's question concerning the extent of the Licensing Board's authority by stating that in considering the need for power, the Board relied on the Federal Power Commission's assessment; "the Board's responsibility is one of establishing the fact that there has been sufficient evidenced produced as to the need for power (as evidenced by the FPC's evaluation and report)." Hearing on the Calvert Cliffs Court Decision before the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., Part 2, 406 (1971).

The Aeschliman Brief also states (p. 7) that the Chairman of the Commission said in October 1971 that

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[4]The entire question and answer read as follows (Hearing on the Calvert Cliffs Court Decision before the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., Part 2, 406 (1971); italics omitted):

> Question 16: Reportedly, the Atomic Safety and Licensing Boards are provided final environmental impact statements as well as agency comments. In evaluating the cost-benefit analysis for a given nuclear power plant does the Board have the flexibility to consider the implications of the rationing or limiting the use of electricity as an alternative to building a particular nuclear power plant?
>
> Answer: The Atomic Safety and Licensing Boards have the authority and responsibility to consider all aspects of the cost-benefit analysis for a given nuclear power plant. This would also include consideration of Environmental Reports submitted by applicants for construction permits and AEC Detailed Environmental Statements where the need for power is discussed.
>
> As Commissioner Doub indicated in his testimony, the FPC is the primary agency concerned with power supply and reliability and the AEC relies on FPC comments and independent assessment of power supply needs in affected areas in connection with each Environmental Statement prepared for a nuclear power plant. The Board's responsibility is one of establishing the fact that there has been sufficient evidence produced as to the need for power (as evidenced by the FPC's evaluation and report).

"energy conservation was a 'legitimate' and 'not unreasonable' issue," and that "long before the *Midland* environmental hearings the Commission acknowledged that 'the desirability and the means of limiting * * * [demand] growth are being debated today.' " In fact, the Commission's Chairman stated that while others had raised "a legitimate social question" whether the society "ought not curb its appetite for energy and for electric power," it would be "inappropriate for the [AEC] to take a position on this issue. The AEC should be officially neutral." Joint Committee on Atomic Energy, Selected Materials on the Calvert Cliffs Decision, its Origin and Aftermath, 92d Cong., 1st Sess. 392, 397 (1972).[5] In addition, while the Commission's staff acknowledged the existence of a debate over the growth of the demand for electric power, it did not expect that debate to influence actual demand in the near future.[6]

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[5]The Chairman stated in pertinent part (*id.* at 397):

> Environmentalists have also been raising questions that transcend the issues involved in individual plants. The question has been raised, by Michael McCloskey of the Sierra Club among others, whether our society for environmental reasons viewed broadly ought not curb its appetite for energy and for electric power. It is a legitimate social question. It is not unreasonable to question whether neon signs or even airconditioning are essential ingredients in the American way of life. More fundamentally it is not unthinkable to inquire whether energy production should be determined solely in response to market demand. * * *
>
> Whatever the private views of the Commissioners, it would seem to me inappropriate for the Atomic Energy Commission to take a position on this issue. The AEC should be officially neutral. It is the AEC's mission to provide energy options that will serve public needs—in whatever manner the public prescribes those needs. The AEC lacks authority and consequently should avoid becoming entangled in the determination of broad social issues of this type.

[6]A 1971 Commission draft environmental impact statement discussed Federal Power Commission estimates of probable electrical

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In sum, the materials cited in the Aeschliman Brief do not suggest that the Commission recognized the need to consider the effects of energy conservation at the time of the Midland hearings. They indicate at most that the Commission was aware in 1971 and 1972 of the beginning debate over broad questions of energy policy, but that the concept of energy conservation was not at that time a recognized alternative to power plant construction. Accordingly, the NEPA did not require the discussion of that alternative in environmental impact statements at that time.

3. The Aeschliman Brief, relying on the record made after the court of appeals' decision, also asserts (pp. 20-21) that the Commission's staff still does not understand the "other problems related to large water reactors" mentioned by the Commission's Advisory Committee on Reactor Safeguards (ACRS) (see Gov't Brief 18). Respondents further contend that the uncertainty concerning when these problems will be resolved raises a serious question about the safety of the Midland reactors (Aeschliman Brief 21). Both arguments are incorrect.

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load growth in the area served by a utility proposing to build a nuclear plant. It then stated that:

> This growth reflects both increasing population and increasing *per capita* consumption of electricity. Although the desirability and the means of limiting both types of growth are being debated today, there is no reason to expect the power demands during the next several years to deviate significantly from the Federal Power Commission predictions.

U.S. Atomic Energy Commission, Division of Radiological and Environmental Protection, Draft Detailed Statement on the Environmental Considerations Related to the Proposed Issuance of an Operating License to the Duke Power Company for the Oconee Nuclear Station, Unit 1, Docket No. 50-269 at 1 (December 13, 1971), reprinted in Joint Hearings, *supra*, at 190, 202.

a. The staff understood quite well just what the ACRS' "other problems" were. The staff has for many years discussed these generic issues with the ACRS during the review of proposed nuclear projects and related technology; the staff is generally familiar with the ACRS concerns (see, *e.g.*, staff testimony at Supp. R. 4171-4173).* Since 1972, the ACRS has issued lists of generic problems—the "other problems" referred to in the Midland report and ACRS reports on other reactors (see Gov't Brief 71-72). Indeed, the staff has been responsible for development of much of the technical information that has ultimately formed the basis for the resolution of many of the ACRS' generic concerns. The staff has also recently established a more formal, systematic program for the resolution of generic technical issues, and the ACRS' generic items have been specifically considered in this program (see letters from Edson G. Case, Acting Director of the Commission's Office of Nuclear Reactor Regulation, to Myer Bender, Chairman, ACRS, October 19, 1977 and October 25, 1977). Additionally, the testimony at the remand hearing makes clear that the staff was aware of the ACRS' generic concerns. In response to the court of appeals mandate, the ACRS wrote a November 18, 1976 "Supplemental Report" on the Midland Plant (Gov't Ex. 1, Supp. R. 1372, 4183). The staff's written direct testimony includes a detailed discussion of the nature and status of each of the 11 items listed in the Supplemental Report (following Supp. R. 4177, entitled *Draft Analysis of ACRS Report of 11/18/76*). Six items and part of a seventh were considered resolved by the time that testimony was written.

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*"Supp. R." refers to the transcript on remand after the court of appeals' decision.

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b. The existence of the "other problems" referred to in the ACRS letter does not indicate that significant safety questions were overlooked in issuing the Midland construction permit (see Aeschliman Brief 28-29). The ACRS letters in this case reported the Committee's conclusion that issuance of a construction permit for the Midland reactors was consistent with the public health and safety (R. 2615-2616; Gov't Brief 18). The reference to "other problems related to large water reactors" did not suggest that the proposed plant should not be licensed, but rather reflected the ACRS' judgment that certain unresolved issues deserve the staff's serious and continued attention (Supp. R. 4200-4222). As staff testimony amply indicates, the ACRS does not expect that all these problems will be solved during construction. What is expected is that "due consideration"—resolution of some and a good faith effort to solve others—will be given to these problems (Supp. R. 4214-4218). The degree of resolution considered appropriate for a particular generic issue is a matter of informed judgment (Supp. R. 4218-4222).[8] In no event may a plant begin operation unless the problems have been resolved to the extent that there is "an adequate level of safety at the plant" although some problems remain unresolved (Supp. R. 4221). Cf. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 404-410.

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[8]The degree of resolution considered appropriate for a particular item depends on a number of factors, among them the specific design of the particular plant, the safety significance of the particular item with respect to the type of plant involved, the state of related technology, and the impact of the item on other safety-related features and plant performance. The decision to permit a specific item to remain unresolved is also based on the judgment that when solutions are found there will be adequate opportunity to consider whether their implementation in plants under construction and in operation should be required as an additional safety measure.

In sum, efforts to resolve generic problems are expected to receive serious and continued consideration. The construction or operation of a power plant may be licensed despite the existence of unresolved generic problems only when the Commission concludes that the public safety will not be compromised by the issuance of the license.

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals in No. 76-419 should be reversed, and the judgment in No. 76-528 should be reversed insofar as it remands the orders granting construction permits for the Midland reactors to the Commission for further proceedings.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

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